

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1144 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
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KAMLALBEN W/O.MADHUKAR R JOSHI

Versus

PARMODBHAI LALBHAI VAIDYA

Appearance:

MR HB SHAH for Petitioners
MR G M Goshi for Respondent No. 1, 2, 3, 4, 5

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 20/01/98

ORAL JUDGEMENT

This is landlord-plaintiff's Revision under section 29(2) of the Bombay Rent, Hotel and Lodging House Rates Control Act (for short, 'the Act') against the judgment and decree dated 11.1.1983 passed by the Second Extra Asstt. Judge, Vadodara reversing the judgment and decree dated 31.7.1981 passed by the Addl.Judge, Small Causes Court, Vadodara.

2. The petitioner-plaintiff filed a Rent Suit No.922/76 in the Small Causes Court, Vadodara for recovery of possession of the suit premises on the ground that it was let out to one Lalbhai Vaidya who died in November, 1975 and after his death, defendants No.1 to 3 who are his Sons, defendant No.4, his married daughter and defendant No.5, the widow of Lalbhai, have no right, title or interest in the suit premises and as such they are trespassers.

3. Defendants No.1 and 2 filed joint written statement and so as defendants No.4 and 5. Defendant No.3 filed separate written statement. It was admitted that Lalbhai died in the year 1975. They however, denied that the suit premise was leased to Lalbhai only for the specific purpose of running his Ayurvedic dispensary.

4. The trial court came to the conclusion that after the death of Lalbhai, as none of the defendants were doing business of running Ayurvedic dispensary in the suit premises, the tenancy did not transmit into any of the defendants in accordance with the provisions of section 5(11)(ii) of the Act.

5. The Appellate Court held that for the purpose of transmission of tenancy under section 5(11)(c) of the Act, the landlord can accept any of the heirs of the original tenant as his tenant for the purpose of receiving rent and any of the tenants among themselves, by entering into agreement, elect any particular defendant to be treated as tenant for the purpose of paying rent, but he would be representing all other co-tenants along with him. The Court further held that in view of sections 12 and 13 of the Rent Act if the heirs of the deceased tenant inheriting tenancy right of the deceased tenant, are ready and willing to perform all the conditions of the lease, the landlord cannot obtain the possession of the suit premises unless the case is covered under Section 12 (1) or section 12 (2) or section 13 of the Act. The learned Court, in view of the aforesaid legal position and of the admitted fact that the defendants are running business in the suit premises in the name of Prashant Traders, reversed the decree passed by the trial court.

6. It is contended by Mr H B Mehta, learned advocate for the petitioner that the learned Appellate Court has committed error in misconstruing the provisions of section 5 (11) (c) (ii) of the Rent Act which clearly spells out that only those heirs of the deceased tenant in a business premises would be entitled to remain in

possession of the premises as tenants after the death of the original tenants, who have carried on business with him before or at the time of his death. Mr H B Shah, learned Advocate submitted that it is an admitted position that none of the defendants has carried on profession of Vaidya with Shri Lalbhai, the deceased original tenant on or before his death.

7. In order to appreciate the contentions raised by the learned Advocates for the parties, it will be appropriate to read definition of tenant as given under section 5 (11) (c) of the Act which reads as follows:

"5(11)(c)

- (i) in relation to premises let for residence, any member of the tenant's family residing with the tenant at the time of or within three months immediately preceding, the death of the tenant as may be decided in default of agreement by the court, and
- (ii) in relation to premises let for business, trade or storage, any member of the tenant's family carrying on business, trade or storage with the tenant in the said premises at the time of the death of the tenant as may continue, after his death, to carry on the business, trade or storage, as the case may be, in the said premises and as may be decided in default of agreement by the Court."

A reading of the definition clearly shows that there is a well-founded distinction between residential and commercial premises. In a case of residential premises, tenancy may be devolved on any member of the tenant's family, residing at the time of or within 3 months immediately preceding the death of the tenant. But in case of business premises, for devolving a tenancy right, following are the requirements:-

- (1) He must be a member of the tenant's family
- (2) He must be carrying on business, trade or storage with the tenant in the said premises at the time of the death of the tenant, and

(3) After the death of the original tenant,
he must be continuing on business, trade
or storage.

8. The Apex Court in the case of BHAVARLAL LALCHAND SHAH v. KANAIYALAL INTWALA, reported in 1986 (1) GLR 492, considering the provisions of section 5 (11) (c) (ii), held that the legislature has restricted the right to inherit the right to tenancy of the premise let out for business, trade or storage to any member of the tenant's family carrying on business, trade or storage with the tenant at the time of his death. The Court further held that it is not open for the Court by judicial construction to extent the said right to persons who are not members of the tenant's family who claim under testamentary succession.

9. This Court in the case of INDUBEN v. SAIYED MAHMAD JIYA & ORS., reported in 1985 GLH 138 has examined the provisions of section 5(11)(c)(ii) in great detail. The Court held that definition of a tenant under section 5(11)(ii) is an inclusive definition. *Sine qua non* for transmission of tenancy in case of premises let for business is that one or more members of the tenant's family were carrying on business in the demised premises with the tenant at the time of the latter's death. The Court further held that if this basic fact is not established, there would be no question of transmission of tenancy under the said clause.

10. Mr G M Joshi, learned Advocate appearing for the respondent-defendants tried to distinguish those cases. It is submitted that the case of INDUBEN (*supra*), was a case of sub-tenancy and in that case, the widow of the deceased had sub-let the premises by entering into an agreement with the partner of Anupam Automobiles. In my view, there is no substance in the contention raised by Mr Joshi. This fact does not affect the ratio laid down by the Court.

11. Reverting back to the present case, it is not in dispute that none of the defendants were carrying on business of Ayurvedic dispensary along with the deceased Lalbhai, who died in November, 1975. At present the suit premises is in the possession of defendants No.4 & 5. According to PW-1, during his life time, defendant No.1 was serving in IPCL for the last 15 years. Defendant No.2 was also serving for the last 10 years and defendant No.3 was serving as Teacher elsewhere for the last about 8 to 10 years. He has admitted that the deceased has one daughter - Urmila who is already

married. It is also admitted that presently there is a provision store in the suit premises in the name of Prashant Traders. In view of these facts, ita cannot be said that the tenancy has transmitted in favour of the defendants in accordance with the provisions of section 5 (11) (c) (ii) of the Act.

12. In view of the aforesaid, this Civil Revision Application is allowed and the judgment and decree dated 1.1.1983 passed by the Second Extra Asstt. Judge, Vadodara is quashed and set aside. The judgment and decree dated 31.1.1981 passed by the Addl.Judge, Small Causes Court, Vadodara in Rent Suit No.922/76 is restored. Rule made absolute accordingly.

13. Mr G M Joshi, learned Advocate for the respondent-defendant states that a reasonable time may be given to the tenant-defendants for vacating the premises. He states that the defendants will require at lease two years' time to vacate the demised premises. Considering the facts and circumstances of the case, I allow the respondent-defendants to vacate the premises by 30th April, 1998 provided the defendant/s furnishes undertaking to the effect that they will handover the vacant possession of the suit premises on or before 30.4.1998 and they will pay or deposit the arrears of rent, if any, due within a period of two weeks and further continue to pay or deposit the mesne profit Rs.18/- per month. The respondents are allowed to file undertaking within a period of two weeks.

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msp.